

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000543-001 DT

02/21/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

BRIAN W ROCK

v.

SHAWN JOSEPH FRAZER (001)

MICHAEL J DEW

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14001576.

Defendant-Appellee Shawn Joseph Frazer (Defendant) was charged in Phoenix Municipal Court with driving under the influence. Plaintiff-Appellant the State of Arizona contends the trial court erred in granting Defendant's Motion To Suppress, which alleged the officer did not have reasonable suspicion to stop his vehicle. For the following reasons, this Court reverses the ruling of the trial court.

I. FACTUAL BACKGROUND.

On October 28, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2). Prior to trial, Defendant filed a Motion To Suppress alleging the officer did not have reasonable suspicion to stop his vehicle.

At the hearing on Defendant's motion, Officer Anthony Daley testified he and Officer Geary were on duty on October 28, 2011, in the area of 25th Street and Van Buren. (R.T. of May 22, 2012, at 2-3.) At approximately midnight, they were traveling east on Van Buren and turned south onto 25th Street. (*Id.*) As they rounded the corner, Officer Daley saw a vehicle completely stopped in the middle of the southbound lane approximately one car length from Van Buren. (*Id.* at 3-4.) As a result, Officer Daley had to swerve around that vehicle and go into the oncoming (northbound) lane to get around that vehicle. (*Id.* at 3-4, 6-7, 11.) He said he would not have been able to make that maneuver if there had been a vehicle in the oncoming lane. (*Id.* at 7.) Officer Daley traveled south and made a U-turn to conduct a traffic stop on the vehicle, but as they drove by the vehicle, it started to drive south on 25th Street and turned right onto Monroe and then right onto 24th Place. (*Id.* at 3, 7-8.) At that point, Officer Daley was able to make the traffic stop. (*Id.* at 8.)

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The prosecutor argued to the trial court that Defendant's actions violated both A.R.S. § 28–704 and Phoenix City Code (P.C.C.) § 36–136. (R.T. of May 22, 2012, at 14–16.) Defendant's attorney argued Defendant's vehicle was traveling slowly and Officer Daley had to swerve around Defendant's vehicle because they took the turn too fast, and Officer Daley's reasons for stopping Defendant's vehicle were pretextual. (*Id.* at 16–19.) In rebuttal, the prosecutor argued there was no testimony that Defendant's vehicle was moving. (*Id.* at 19–20.) The trial court then ruled as follows:

THE COURT: All right. Well, looking at the State's Exhibit 1, it does look like there should be plenty of opportunity to see a vehicle even this [*sic*] it's stopped right south of Van Buren there. And as I—as—if I'm looking at this correctly, it looks like there's rows of parking spots right in front of the hotel. So if you're looking for an address, considering a parking spot, the kinds of reasons someone might be stopped there, and at that time of night not impeding traffic.

Now, my recollection of the officer's testimony is that the car was stopped but as he prepared to turn around or maybe just after he just turned around the car was moving southbound. So the stop of the vehicle—and I—and I accept that the officer says that it was stopped—sounds momentary to me. So even if there was perhaps a violation, it seems like it's more like *Livingston*. This is a minor breach; all kinds of other reasons.

....

... So Defendant's motion is granted.

(R.T. of May 22, 2012, at 20–21.)

On June 1, 2012, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL ERR AS A MATTER OF LAW IN FINDING DEFENDANT DID NOT VIOLATE EITHER THE STATE STATUTE OF THE CITY CODE PROVISION.

The State contends the trial court erred as a matter of law in finding Defendant did not violate either the State statute or the City Code provision. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). For reasonable suspicion, the Arizona Supreme Court has said:

Police officers may briefly detain an individual who they have reasonable suspicion to believe is involved in a crime. In assessing the reasonableness of a *Terry* stop, we examine “(1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related to the circumstances which justified the interference in the first place.”

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. . . Reasonable suspicion requires “a particularized and objective basis for suspecting that a person is engaged in criminal activity.” Officers [may not] act on a mere hunch, but seemingly innocent behavior [may] form the basis for reasonable suspicion if an officer, based on training and experience, can “perceive and articulate meaning in given conduct[,] which would be wholly innocent to the untrained observer.” The totality of the circumstances, not each factor in isolation, determines whether reasonable suspicion exists. (Noting that *Terry* forbids a “divide-and-conquer analysis”).

State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 11–12 (2012) (citations omitted), *accord*, *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985) (police officer has reasonable suspicion to detain person if there are articulable facts for officer to suspect person is involved in criminal activity or commission of a traffic offense). The Arizona statutes provide that a peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer’s presence. A.R.S. § 28–1594; A.R.S. § 13–3883(B). In this context, the Arizona Supreme Court has said:

The fourth amendment to the United States Constitution guarantees the right to be secure against unreasonable search and seizure. This guarantee requires arrests to be based on probable cause and permits limited investigatory stops based only on an articulable reasonable suspicion of criminal activity. Such stops are permitted although they constitute seizures under the fourth amendment. Officer Hohn testified that he stopped Blake because Blake’s car had been weaving in its lane, and he suspected the driver to be under the influence of alcohol. We find that Blake’s weaving was a specific and articulable fact which justified an investigative stop.

State v. Superior Court (Blake), 149 Ariz. 269, 273, 718 P.2d 171, 175 (1986) (citations omitted). The Arizona Court of Appeals has held a traffic violation provides sufficient grounds to stop a vehicle. *State v. Orendain*, 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (Ct. App. 1996); *State v. Acosta*, 166 Ariz. 254, 257, 801 P.2d 489, 492 (Ct. App. 1990), *quoting United States v. Garcia*, 897 F.2d 1413, 1419 (7th Cir. 1990). Thus, in order for a trial court to find that an officer was legally justified in stopping a suspect, it must find the officer (1) knew of articulable facts that (2) raised a reasonable suspicion of criminal activity or a traffic violation.

In the present matter, the State contended Defendant violated the following State statute:

A. A person shall not drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when either of the following applies:

1. Reduced speed is necessary for safe operation or in compliance with law.
2. The reasonable flow of traffic exceeds the maximum safe operating speed of the lawfully operated implement of husbandry.

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A.R.S. § 28–704. The State further contended Defendant violated the following City Code provision:

No person shall stop, stand or park any vehicle upon a street in such a manner or under such conditions as to impede the free movement of vehicular traffic.

P.C.C. § 36–136. In the present matter, the testimony and the exhibit presented showed 25th Street has one lane of travel in each direction. The trial court stated it accepted the officer's testimony that Defendant's vehicle was stopped in its lane. The trial court therefore accepted the officer's testimony that he had to swerve into the oncoming lane to go around Defendant's vehicle. The trial court therefore found Defendant "impede[d] or block[ed] the normal and reasonable movement of traffic," and "stop[ped], [stood] or park[ed] any vehicle upon a street in such a manner or under such conditions as to impede the free movement of vehicular traffic." The trial court's findings were such that Defendant violated both A.R.S. § 28–704 and P.C.C. § 36–136. Because Defendant violated that State statute and that Phoenix City Code provision, the officer had reasonable suspicion to stop Defendant's vehicle.

It appears from the trial court's ruling it believed Defendant did not violate either provision because (1) the impeding or blocking was momentary, and (2) Defendant could have been looking for an address or considering a parking spot. This would, however, require the court to rewrite the statute to read as follows:

A. A person shall not drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when either of the following applies:

1. Reduced speed is necessary for safe operation or in compliance with law.
2. The reasonable flow of traffic exceeds the maximum safe operating speed of the lawfully operated implement of husbandry.
3. The impeding or blocking is momentary.
4. Once the person has impeded or blocked another vehicle, the person moves their vehicle so they are no longer impeding or blocking any other vehicles.
5. The impeding or blocking is necessary for the person to look for an address or consider a parking spot.

This Court expresses no opinion whether such additions to that statute would be a good idea or a bad idea. This Court would note, however, it is the province of the Arizona Legislature to draft the language of the Arizona Statutes, and it is not the province of either this Court or the trial court to add language to the statute.

Moreover, even if the statute provided it did not apply if the impeding or blocking was only momentary, that would not have negated Officer Daley's legal right to stop Defendant's vehicle. As noted above, the Arizona statutes give an officer the right to stop and detain a person when reasonably necessary to investigate an actual or a *suspected* violation of a traffic law. The ques-

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tion would be whether the officer was reasonable in suspecting the impeding or blocking was more than momentary. In the present case, the impeding or blocking was for a long enough period of time that Officer Daley had to swerve his vehicle around Defendant's vehicle and into the oncoming lane. Certainly a trial court might determine, as did the trial court in this case, that a person's conduct was not a sufficient amount of impeding or blocking to violate the statute, but that ultimate finding of no violation of the statute would not negate a reasonable suspicion, as long as that suspicion was reasonable. As stated by the Arizona Supreme Court:

Moreover, when the police make an arrest based upon probable cause, it is not material that the person arrested may turn out to be innocent, and the arresting officer is not required to conduct a trial before determining whether or not to make the arrest.

Cullison v. City of Peoria, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978). As explained by the United States Supreme Court, this is because the level for reasonable suspicion for a stop and for probable cause for an arrest is considerably less than proof of wrongdoing by a preponderance of the evidence for a civil violation or beyond a reasonable doubt for a criminal conviction:

Although an officer's reliance on a mere "hunch" is insufficient to justify [an investigatory] stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

United States v. Arvizu, 534 U.S. 266, 274 (2002) (citations omitted).

The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.

United States v. Sololow, 490 U.S. 1, 7 (1989) (citations omitted); *accord, Illinois v. Wardlaw*, 528 U.S. 119, 123 (2000). Thus, the trial court's determination that Defendant did not violate A.R.S. § 28-704 did not negate Officer Daley's reasonable suspicion that Defendant did violate the traffic laws.

The trial court relied on *State v. Livingston*, 206 Ariz. 145, 75 P.3d 1103 (Ct. App. 2003), but this Court concludes *Livingston* is distinguishable for three reasons. First, in *Livingston*, the issue was whether the defendant had *in fact* violated a traffic law, and thus there was no discussion of the right of an officer to stop and detain a person when reasonably necessary to investigate a *suspected* violation of a traffic law under A.R.S. § 13-3883(B) and A.R.S. § 28-1594. Thus, the fact that the trial court ultimately concluded Defendant did not violate A.R.S. § 28-704 did not negate Officer Daley's statutory right to stop and detain Defendant to investigate a *suspected* violation of the traffic laws. Second, in *Livingston*, the officer's primary intent in stopping vehicles was to find violations of drug offenses, and was using an alleged traffic violation as the reason for the stop. In the present case, the officer's intent was to identify drivers who were commit-

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ting traffic violations. Third, in *Livingston*, the court recognized the Arizona Legislature had written the statute in such a way that it did not penalize a momentary deviation outside the lane line:

Here, the state argues that the officer witnessed objective facts that constituted a violation of § 28–729(1). We do not agree. Section 28–729(1) reads, in pertinent part, as follows:

If a roadway is divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent with this section apply:

1. A person shall drive a vehicle *as nearly as practicable* entirely within a single lane and shall not move the vehicle from that lane until the driver has first ascertained that the movement can be made with safety.

(Emphasis added.) Under that statute, a driver is required to remain exclusively in a single lane only “as nearly as practicable” under the circumstances. That language demonstrates an express legislative intent to avoid penalizing brief, momentary, and minor deviations outside the marked lines.

Livingston at ¶ 10 (emphasis original). The court thus found *Livingston* did not violate the statute. In the present case, as noted above, A.R.S. § 28–704 does not contain any language indicating “an express legislative intent to avoid penalizing brief, momentary, and minor” impeding or blocking traffic. For § 28–729(1), the language was there in the statute, thus the court did not have to add anything. For § 28–704, the language is not there in the statute, thus a court would have to add language to reach the same result as in *Livingston*, and as discussed above, a court is not allowed to add language to a statute when the Arizona Legislature has not done so.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred as a matter of law when it found Officer Daley did not have a reasonable suspicion that Defendant had violated the traffic laws.

IT IS THEREFORE ORDERED vacating and reversing the trial court’s order granting Defendant Motion To Suppress.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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